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Policies and Procedures

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This P&P contains Economics agencies' policy regarding the administration of the Freedom of Information Act and the Privacy Act. It assigns responsibilities and provides guidance to all employees on what to do when they receive requests for

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1. Introduction

This P&P provides instruction to all Economics agencies employees regarding procedures for identifying and responding to requests for information pursuant to the Freedom of Information Act (FOIA) and the Privacy Act (PA). It also describes what they should do if they receive subpoenas ordering them to either produce agency records or appear as witnesses in judicial or administrative proceedings. Employees should refer to this P&P for guidance whenever they receive a request to inspect or obtain a copy of any agency record.

2. Freedom of Information Act

The Freedom of Information Act (FOIA) generally provides that any person has a right of access to Federal agency records, except to the extent that such records (or portions of them) are protected from disclosure by any of nine exemptions. Categories of FOIA-exempt records commonly found in the Economics agencies include:

- records related solely to the internal personnel rules and practices of an agency.¹
- records that have been properly classified as top secret, secret, or confidential;
- information specifically exempted from disclosure by statute;²
- confidential commercial or financial information obtained from a person that is privileged or confidential;³
- interagency or intra-agency memoranda that are part of a decisionmaking process;⁴ and

¹This includes internal matters of a relatively trivial nature, as well as more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement.

²For example, 7 U.S.C. 2276 prohibits the disclosure of the agricultural data that NASS collects, unless it has been aggregated so that the identity of the person who supplied it is not discernable.

³This includes trade secrets, research data, technical designs, customer and supplier lists, profit and loss data, overhead and operating costs, and information on financial condition.

⁴The Economics agencies often invoke the “deliberative process privilege” to encourage open, frank discussions on matters of policy between subordinates and superiors; to protect against premature disclosure of proposed policies before they are formally adopted; and to protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for the agency's action. This exemption protects drafts of letters, memoranda, and reports, as well as

- personnel and medical files and similar files where the disclosure would constitute a clearly unwarranted invasion of personal privacy.

For the purposes of the FOIA, “agency records” are all documents that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.

Policy on Responses

It is the policy of the Economics agencies to respond to all FOIA requests in a timely manner and to achieve maximum possible disclosure under the law. This policy is consistent with the October 1993 Attorney General's FOIA Memorandum, in which the Attorney General stated that “it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be.”

Requests for Records

Any employee may receive a request for agency records. These requests may be either oral or written, formal or informal.

Identifying FOIA Requests. A FOIA request is any request for agency records from anyone outside the executive branch of the Federal Government, including executive branch employees acting as private citizens. Requests for records from congressional committees or the General Accounting Office fall outside the scope of the FOIA. Not every request for information is a FOIA request, such as

- published information, especially information contained in publications that we offer for sale;
- information that you are certain would not fall under any of the FOIA exemptions, such as requests from the public for most statistical data, economic analyses, and most procurement-related requests for information (names of contractors, bidders lists, etc.).
- information that we regularly make available to the public through news releases or on electronic bulletin boards.

Please remember that some people may request agency records either verbally or in writing, and they

any other “predecisional” documents that contain analyses and/or recommendations.

may not specifically cite the FOIA. It is up to you to decide if it should be treated as a FOIA request. If you are certain that the records do not fall under one of the exemptions described above, go ahead and release them. If you believe that they may fall under one of the exemptions, or if you are not sure, contact the FOIA/PA Officer. If you receive a verbal request for records that should be treated as a FOIA request, ask the person to put the request in writing and to submit it to the FOIA/PA Officer.

Responding to Initial Requests

The Chief, Management Analysis Branch (MAB), EMS, is the FOIA/PA Officer for the Economics agencies. The Economics agency heads have delegated authority to the FOIA/PA Officer to respond to initial FOIA requests. The FOIA/PA Officer may redelegate this authority to other officials in MAB.

The FOIA/PA Officer is the **only** official in the Economics agencies authorized to respond to FOIA requests. The FOIA/PA Officer must respond to initial FOIA requests within 10 working days after receiving them. **Because the 10 day response period does not begin until the FOIA/PA Officer receives the request, you must forward all FOIA requests to the FOIA/PA Officer immediately.**

The FOIA/PA Officer may extend the deadline an additional 10 working days under the following circumstances:

- in cases where there is a need to search for and collect the requested records from field offices or places other than headquarters office space;
- when there is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records; or
- when there is a need to consult with another department or agency having a substantial interest in the determination of the request.

The FOIA/PA Officer must inform the requester of the delay, giving a reason for the extension and an estimate of the date of the final determination.

The FOIA/PA Officer is responsible for initiating the search for all records responsive to the request. The FOIA/PA Officer must forward a copy of the request to the appropriate FOIA/PA Coordinating Official, who will then initiate the search for the responsive records within the agency and forward copies of them to the FOIA/PA Officer. The FOIA/PA Coordinating Officials are:

- Economic Analysis Staff: Director.
- Economics Management Staff: Deputy Director and office of record.

- Economic Research Service: Assistant to the Administrator.
- National Agricultural Statistics Service: Deputy Administrator for Programs.
- Office of Energy: Agricultural Economist.
- World Agricultural Outlook Board: Deputy Chairperson.

Agency employees must search for all records responsive to requests whenever asked to do so by the FOIA/PA Officer or the FOIA/PA Coordinating Official. The FOIA requires agencies to provide all existing records that are responsive to requests. It does not require anyone to create new records.

Information Submitted by Private Businesses

When the FOIA/PA Officer cannot readily determine whether the information obtained from a person or private business is privileged or confidential business information, the views of the submitters of the information must be obtained and considered and the submitters must be provided with an opportunity to object to any decision to disclose the information. The submitter has up to 10 working days to prepare a justification for nondisclosure. The FOIA/PA Officer must also notify the requester of the need to inform the submitters of a request for the information. The FOIA/PA Officer must also provide business information submitters with notice of any determination to disclose business information prior to releasing it, so that the submitters may consider possible judicial intervention.

Fees

The FOIA/PA Officer may charge for search, review, and duplication costs in accordance with the Fee Schedule appended to the Department's FOIA Regulations (7 CFR 1.1-1.23). The Fee Schedule allows the FOIA officer to treat different categories of requesters differently, depending on the circumstances. For example, requesters who want to use the information for commercial uses can be charged more than educational and non-commercial scientific institution requesters, representatives of the news media, or private citizens who want the information for non-commercial purposes.

Some requesters may obtain a fee waiver under the following circumstances:

- if the FOIA/PA Officer determines that disclosure of the information is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester;
- if the fee is \$25.00 or less;
- if furnishing the information without charge or at a reduced rate is an appropriate courtesy to a foreign country or international organization;

- if the FOIA/PA Officer determines that payment of the full fee by a State or local government or nonprofit group would not be in the interest of the program involved; or
- if the requester is engaged in a nonprofit activity designed for the public safety, health, or welfare.

Appeals

If requesters are not satisfied with the response to their initial requests, they may appeal the determination to the head of the agency responsible for the records they requested. In cases where the FOIA/PA Officer denies records or when there are no records responsive to the request, the FOIA/PA Officer must advise requesters of their appeal rights.

When agency heads receive appeals of the FOIA/PA Officer's decisions to deny access to records, they must send copies of the appeal letters to the FOIA/PA Officer immediately. The agency head and the FOIA/PA Officer will work with the General Counsel to determine whether the FOIA/PA Officer's initial decision to deny access was appropriate or should be overturned. The agency head has 20 working days to respond to an appeal.

When requesters are not satisfied with the agency heads' decisions, or if the agency fails to respond within the statutory deadlines, requesters may file a complaint in a U.S. District Court. The court has the authority to review agency decisions and, if it determines that the agency inappropriately withheld records, it can order the Government to release the records and pay the requester's attorneys' fees.

Subpoenas

This section describes the procedures governing the appearance of USDA employees as witnesses in order to testify or produce agency records in judicial or administrative proceedings when the appearance is (1) in their official capacity or (2) related to their employment with USDA. We generally treat subpoenas as FOIA requests.

Follow the instructions in the following table when you are served with a subpoena to either produce records or appear in a court.⁵

⁵Agency heads, supervisors, and employees must also refer to 7 CFR 1.210-1.218 for more specific guidance.

Situation	Instructions
You receive a subpoena or summons from a state agency or court.	<ul style="list-style-type: none"> Send the subpoena/summons to the FOIA/PA Officer for response.
You are ordered or asked to appear as a witness on behalf of the United States. ⁶	<ul style="list-style-type: none"> Notify the FOIA/PA Officer. Obtain permission from your immediate supervisor.
You are ordered or asked to appear as a witness on behalf of a party other than the U.S. where the U.S. is not a party.	<ul style="list-style-type: none"> Notify the FOIA/PA Officer. Obtain permission from your agency head and concurrence from the General Counsel.
You are served with a subpoena duces tecum for USDA records in judicial or administrative proceedings in which the U.S. is not a party.	<ul style="list-style-type: none"> Send the subpoena to the FOIA/PA Officer for response.
You are ordered or asked to appear as a witness or produce documents on behalf of a party other than the U.S. where the U.S. is a party.	<ul style="list-style-type: none"> Notify the FOIA/PA Officer. Notify your agency head and the General Counsel of the existence and nature of the order. The agency head must consult with the General Counsel as to how to handle the situation.

3. The Privacy Act

The purpose of the Privacy Act of 1974 (PA) is to balance the Government's need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from Federal agencies' collection, maintenance, use, and disclosure of personal information about them. There are four basic policy objectives:

- To restrict disclosure of personally identifiable records maintained by agencies.
- To grant individuals increased rights of access to agency records maintained on themselves.
- To grant individuals the right to seek amendment of agency records maintained on themselves upon a showing that the records are not accurate, relevant, timely, or complete.

⁶You may also appear as a witness on behalf of the United States without receiving a summons, subpoena, or other compulsory process. However, you must still follow the instructions (above).

- To establish a code of “fair information practices” that requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records.

Information Collection Policy

When collecting information about individuals, the collectors and the system managers must make every effort to collect information directly from the subject person whenever possible. Before asking for the information, you must inform the individuals of the legal authority for the collection, whether response is voluntary or mandatory, the principal purpose(s) for collecting the information, the routine uses of the information, and the effects, if any, of refusing to provide all or part of the information.

Recordkeeping Policy

As it relates to the Privacy Act, a “system of records” is a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. System managers are those officials who are responsible for maintaining systems of records. System managers may maintain information about individuals only if it is relevant and necessary to accomplish a lawful agency purpose. They are responsible for maintaining these records so that they are accurate, timely, and thorough.

Federal Register Notices

The FOIA/PA Officer is responsible for preparing the *Federal Register* notices for each new system of records which must include:

- the name and location of the system,
- the categories of individuals on whom records are maintained in the system,
- the categories of records maintained in the system,
- each routine use of the records contained in the system, including the categories of users and the purpose of such use,
- the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records,

- the title and business address of the agency official who is responsible for the system of records,
- the agency procedures whereby individuals can be notified at their request if the system of records contains records pertaining to them,
- the agency procedures whereby individuals can be notified at their request how they can gain access to any record pertaining to them contained in the system of records, and how they can contest its content, and
- the categories of sources of records in the system.

Changing Routine Uses. The FOIA/PA Officer must provide at least 30 days advance notice of all new or changed routine uses in existing systems of records.

New or Modified Systems of Records. The Privacy Act Officer must provide 60 days advance notice to the Office of Management and Budget, the Congress, and the general public (in the *Federal Register*) of all new systems of records and alterations to existing systems that expand the coverage of individuals, the information maintained, or the access by third parties; or which significantly change the organization of records, system operations, or equipment configuration.

Conditions of Disclosure

Employees may not disclose any record contained in a system of records to any person or to another agency unless the Privacy Act Officer has received a written request by, or has obtained the prior consent of, the individual to whom the record pertains. There are 12 exceptions to this rule:

- disclosure to officers and employees of the agency that maintains the record who have a need for it in the performance of their duties,
- the FOIA requires disclosure,
- disclosure for a routine use that has been published in the *Federal Register*,
- disclosure to the Bureau of the Census for a census or a survey,
- disclosure to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record,
- transfer of permanent Privacy Act records to the National Archives and Records

Administration,

- disclosure to another agency for a civil or criminal law enforcement activity that is authorized by law,
- disclosure to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual,
- disclosure to either House of Congress,
- disclosure to the General Accounting Office,
- disclosure pursuant to an order of a court, and
- disclosure to a consumer reporting agency in accordance with the Debt Collection Act of 1982.⁷

Access and Amendment Rights

Individuals may review information about themselves that is contained in agency records; receive a copy of the information; and correct records that are not accurate, relevant, current, or complete. However, individuals **do not** have access or amendment rights when:

- the system of records is published as exempt from the Privacy Act; or
- the agency compiled the information in anticipation of a civil lawsuit.

Procedures for Responding to Requests for Access

If you receive a request for access, correction, or amendment of a record that is contained in a Privacy Act system of records, forward it to the FOIA/PA Officer immediately. The FOIA/PA Officer, in consultation with the appropriate FOIA/PA Coordinating Official, will work with the appropriate system manager to respond to the request. The FOIA/PA Officer must acknowledge the request no later than 10 days after receiving it.

The agency that maintains the disputed records must promptly either correct any portion the individual

⁷See 31 U.S.C. 3711(f) and 48 Fed. Reg. 15,556-60 (1983).

believes is not accurate, relevant, timely, or complete; or inform the individual of the refusal to amend the record, the reason for the refusal, the procedures for the individual to request a review of the refusal by the agency head, and the name and business address of the agency head.

Appeals

The agency heads, working with the FOIA/PA Officer and the General Counsel, must review all appeals of denied access, correction, or amendment. They must complete this review and make a final determination within 30 working days from the date the individual requested the review. They may extend the 30 day period for good cause.

Whenever agency heads also refuse to amend the disputed record(s), they must permit the individual to file a concise statement setting forth reasons for disagreeing with the agency's refusal. The FOIA/PA Officer or the system managers must also make these statements of disagreements available to anyone to whom they subsequently disclose the record, as well as to prior recipients of the disputed record. The agency heads must also inform requesters of their right to seek judicial review of the agencies' determinations.

Civil Remedies

- Individuals may bring civil suit against the agency whenever the agency:
- makes a determination not to amend their records as requested;
- refuses to comply with their requests to gain access to their records or any information pertaining to them;
- fails to maintain records with such accuracy, relevance, timeliness, and completeness as is necessary to ensure fairness to an individual; or
- fails to comply with any other provision of the Privacy Act in such a way as to have an adverse effect on an individual.

Criminal Penalties

If you, by virtue of your position, have possession of, or access to, records contained in Privacy Act

systems of records, the disclosure of which is prohibited by the Privacy Act, and knowing that disclosure of the information is prohibited, you willfully disclose the information in any manner to any person or agency not entitled to receive it, you are guilty of a misdemeanor and can be fined up to \$5,000.

Social Security Numbers

Before soliciting social security numbers, agencies must inform individuals of the authority for collection, whether disclosure is mandatory or voluntary, and the intended uses. Agencies may not deny to any individual any legal right, benefit, or privilege for refusal to disclose a social security number, unless disclosure is required by law.

4. Summary of Responsibilities

All Employees

- Forward all FOIA and Privacy Act requests to the FOIA/PA Officer.
- When asked, conduct a thorough search for records responsive to a request.

Agency Heads

- Retain overall responsibility for FOIA/Privacy Act compliance.
- Designate FOIA/PA Coordinating Officials.
- Designate Privacy Act system managers.
- Receive and respond to FOIA/PA appeals, which includes deciding whether to
 - grant or deny the appeals;
 - extend the appeal response period;
 - release FOIA-exempt records when in the public interest; and
 - grant or deny appeals for fee waivers.

Privacy Act System Managers

- Maintain the systems of records under their control in such a way as to ensure that the information contained in them is accurate, relevant, timely, and complete.
- Adhere to the Economics agencies information collection and recordkeeping policies.
- Provide appropriate security for the records maintained in Privacy Act systems, to minimize the possibility of inappropriate disclosures.
- Inform third parties to whom records are disclosed of any corrections or statements of dispute to those records.

FOIA/PA Coordinating Officials

- Assist the Economics Agencies FOIA/PA Officer in collecting, examining, and deleting FOIA-exempt matter from agency records.
- Assist the FOIA/PA Officer in locating and collecting records responsive to Privacy Act access requests.
- Advise the FOIA/PA Officer concerning responses to FOIA and Privacy Act requests.

FOIA/PA Officer (Chief, Management Analysis Branch, Administrative Services Division, EMS)

- Receives and responds to initial FOIA requests and Privacy Act requests for access and/or amendment.
- Decides whether to
 - grant or deny initial FOIA requests;
 - grant or deny Privacy Act access requests;
 - grant or deny Privacy Act amendment/correction requests;
 - extend the initial response period;
 - release FOIA-exempt records when in the public interest; and
 - waive fees for search, review, and duplication services.
- In cases of denials of FOIA requests, advises requesters of their right to appeal the decision to the appropriate agency head(s).
- In cases of denials of access to or amendment of Privacy Act records, advises individuals of their right to seek judicial review and, where amendment is denied, of the right to file a

statement of dispute.

- Informs third parties to whom records have been disclosed of any corrections or statements of dispute to those records.
- Consults business submitters of confidential commercial or financial information requested under the FOIA and advises them of decisions to release the information in cases where their wishes were overruled.
- Assists agency heads in preparing responses to FOIA and Privacy Act appeals and in obtaining the General Counsel's review of proposed appeal responses.
- Maintains FOIA and Privacy Act administrative records, including accountings of disclosures under both laws.
- Prepares all required FOIA and Privacy Act reports.
- Prepares FOIA regulations and Privacy Act notices for publication in the *Federal Register*.
- Decides whether to release records sought by subpoena, order, or other compulsory legal process, following consultation with FOIA/PA Coordinating Officials and the General Counsel. Refers decisions to the appropriate agency head if compliance is deemed improper.

5. Glossary

Agency Record. Documents that are (1) either created or obtained by an agency and (2) under agency control. Documents include all books, papers, maps, photographs, machine-readable materials, regardless of physical form or characteristics, that are preserved or appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. **Reference materials, library materials preserved solely for reference or exhibition purposes, and extra copies of publications are not agency records.**

Individual. A citizen of the United States or an alien lawfully admitted for permanent residence.

Person. Individuals, foreign citizens, partnerships, corporations, associations, and foreign or domestic governments (not including Federal Government agencies). For purposes of the FOIA, those who flout the law (such as fugitives) and agents acting on their behalf do not count as “people.”

Routine Use. With respect to the disclosure of a record, the use of such record for a purpose that is

compatible with the purpose for which it was collected.

Subpoena Duces Tecum. A writ commanding a person to produce in court certain designated documents or other evidence.

System of Records. A group of any records under the control of any agency from which information is retrieved by the individual's name or by some identifying number, symbol, or other identifying particular assigned to the individual. The Privacy Act pertains only to systems of records.